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Attorneys for Defendant/Counter-Plaintiff,
 KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
 CERAMICS, INC. dba GLIDEWELL
 LABORATORIES,

Plaintiff,

v.

KEATING DENTAL ARTS, INC.

Defendant.

AND RELATED COUNTERCLAIMS.

Civil Action No.
 SACV11-01309-DOC(ANx)

**KEATING'S OBJECTIONS
 TO EVIDENCE SUBMITTED
 BY GLIDEWELL'S EXPERT
 DR. RONALD GOLDSTEIN
 IN SUPPORT OF ITS
 MOTIONS FOR PARTIAL
 SUMMARY JUDGMENT**

Honorable David O. Carter

1 **I. INTRODUCTION**

2 Defendant Keating Dental Arts, Inc. (“Keating”) hereby objects to the
3 Declaration of Dr. Ronald Goldstein in Support of James R. Glidewell Dental
4 Ceramics, Inc.’s Motions for Summary Judgment (Dkt. No. 90, Ex. O). The
5 declaration objected to is inadmissible in full and part, and Keating requests that
6 it not be considered as part of the record in deciding Glidewell’s motions for
7 partial summary judgment.

8 Goldstein’s Declaration was not timely served and should therefore be
9 excluded under F.R.C.P. 37(c). After this Court denied Glidewell’s motion to
10 amend the scheduling order, Glidewell has continued to produce information
11 and witnesses in violation of F.R.C.P. 37(c). In its motions for summary
12 judgment, Glidewell has relied on several witnesses (including Dr. Goldstein)
13 not noticed in a timely served initial disclosure.

14 Glidewell’s actions are unacceptable and flagrantly disregard this Courts
15 orders by attempting to go behind the Court’s back to continue discovery and
16 production—Glidewell produced new witnesses, in violation of the Federal
17 Rules of Civil Procedure after an explicit proscription by this Court. F.R.C.P.
18 37(c) (If a party fails to provide information or identify a witness as required by
19 Rule 26(a) or (e), **the party is not allowed to use that information or witness**
20 to supply evidence on a motion) (emphasis added).

21 Therefore, Defendant respectfully requests that this Court exclude all of
22 the Plaintiff’s untimely information and witnesses because such evidence
23 violates both the Court’s orders and the Federal Rules of Civil Procedure.
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II. OBJECTIONS

A. Objections to the Declaration of Dr. Goldstein

	Testimony	Objection
	¶ 12	<p>Lack of personal knowledge (as to the individual knowledge of the one to two thousand dentists with whom Goldstein interacts)</p> <ul style="list-style-type: none"> • “The vast majority of the one to two thousand dentists with whom I interact through my practice and at these conferences understands that BruxZir identifies Glidewell as a source of the solid zirconia crown products.” <p>Lack of personal knowledge (as to whether those same one to two thousand dentists ever use certain terms in their vocabulary)</p> <ul style="list-style-type: none"> • “In addition, the vast majority of these same dentists do not use the term BruxZir or ‘bruxer’ to refer generally to a solid zirconia crown.” <p>(See Fed. R. Evid. 602) (“A witness may not testify to matter less evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”)</p>
	¶ 13	<p>Hearsay (Fed. R. Evid. 802) (as to the following statement, which relies on hearsay:</p> <ul style="list-style-type: none"> • “I never heard either the speaker or dentists in the audience with whom I spoke

1		Testimony	Objection
2			one-on-one after the lecture
3			use the terms BruxZir or
4			‘bruxer’ crown in a generic
5			sense to refer to solid zirconia
6			crowns.”
7			Dr. Goldstein is essentially testifying
8			to the content of his conversations
9			with others and what those others did
10			or did not say.
11			He is using this out of court statement
12			to prove the truth of the matter
13			asserted in that those specific dentists
14			did not use certain terms in
15			conversation.
16		¶ 15	Hearsay (Fed. R. Evid. 802) (as to the
17			following statement:
18			• “In my numerous discussions
19			and interactions with four
20			prosthodontists in my dental
21			practice, they have all
22			expressed to me an
23			understanding or
24			acknowledgement that the
25			BruxZir mark identifies the
26			source of a solid zirconia
27			crown or material used to make
28			solid zirconia crowns as
			sourced from Glidewell.”
		¶ 16	Lack of personal knowledge (as to
			the recognition/knowledge of the
			BruxZir mark in the minds of
			dentists, dental labs, and others in the
			dental industry)
			• “BruxZir is a well-known and
			widely recognized brand name

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	Testimony	Objection
		<p>for solid zirconia crowns among dentists, dental labs, and others in the dental industry. . .”</p> <p>6:25-26</p> <p>Lack of personal knowledge (as to Glidewell’s brand recognition in the minds of other dentists– no survey was performed, and no foundation was laid for such an opinion)</p> <ul style="list-style-type: none"> • “Glidewell’s brand recognition for its BruxZir solid zirconia crowns is as strong as any other dental product I have seen.” <p>6: 28 – 7:2</p> <p>Lack of personal knowledge (as to the strength of Glidewell’s brand recognition in the minds of other dentists– no survey was performed, and no foundation was laid for such an opinion)</p> <ul style="list-style-type: none"> • “BruxZir is like Coca-Cola to dentists as it is a source identifier for products offered by the predominant supplier of solid zirconia crowns and material used to make solid zirconia crowns, and product branded under the BruxZir mark has a large market share in the dental industry.” <p>7:2 – 7:5</p> <p>(See Fed. R. Evid. 602) (“ A witness may not testify to matter less</p>

	Testimony	Objection
		evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”)
	¶ 19	<p>Impermissible conclusion (as to the statement that a single Glidewell publication demonstrates wide recognition of the BruxZir solid zirconia crown). 8:18-19</p> <p>Lack of personal knowledge (as to whether one publication demonstrates prevalence and wide recognition of the BruxZir solid zirconia crown).</p> <p>(See Fed. R. Evid. 602) (“A witness may not testify to matter less evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”)</p>
	¶ 23	<p>Inconsistent with Interrogatory Responses # 7 & 23</p> <p>Hearsay (Fed. R. Evid. 802) (as to the conversation between Fallon, Carlisle, and Dr. Le).</p>
	¶ 24	Impermissible legal conclusion (in that Dr. Goldstein testifies that the BruxZir mark is a strong source identifier – essentially saying that it is a strong trademark (note that, unlike other places in his report, Dr. Goldstein does <i>not</i> say that BruxZir strongly identifies a source: strong modifies mark rather than source identifier). Dr. Goldstein is not qualified to be opining as to trademark law and the legal strength

	Testimony	Objection
		of a mark.
	¶ 26	<p>Impermissible legal conclusion (as to the following statement:</p> <ul style="list-style-type: none"> The actual confusion caused by these similarities is sufficient to overcome the subtle differences in the two marks in the ‘buyer’s mind’ when the buyer makes the decision to purchase Keating’s dental crowns under the KDZ Bruxer mark than if products marketed under the two marks were offered side by side, as is clearly evidenced in the communications between Fallon, Carlisle, and Dr. Le aforementioned. <p>Dr. Goldstein is not qualified to opine as to trademark law.</p>
	¶ 28	<p>Inconsistent with the evidence. While a Keating employee did explain to Dr. Tobin that “BruxZir” was a proprietary name, it was never referenced as being source identifying. Proprietary is not synonymous with source-identifying and Goldstein is not qualified to be testifying as to trademark law.</p>

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2 **III. CONCLUSION**

3 Based upon the objections that Keating has made with respect to the
4 above-identified portions of the Declaration of Dr. Ronald Goldstein, Keating
5 respectfully requests that the Court strike and not consider the identified
6 declaration and portions thereof in deciding Glidewell's motions for partial
7 summary judgment.

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9 Respectfully submitted,
10 KNOBBE, MARTENS, OLSON & BEAR, LLP
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12 Dated: November 26, 2012 By: /s/ Lynda J. Zadra-Symes

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